

STATE OF MICHIGAN
COURT OF APPEALS

JAMES RICHARD ARNOLD and CAROL
ARNOLD,

UNPUBLISHED
January 25, 2007

Plaintiffs-Counter-Defendants-
Appellees,

V

Nos. 262349; 263157
St. Joseph Circuit Court
LC No. 96-001144-CH

DENNIS R. KEMP and MICHAEL D. KEMP,

Defendants-Counter-Plaintiffs-
Appellants,

and

DALE ARNOLD, WILLIAM C. DUNN, and
IOLA C. DUNN,

Third-Party Defendants-Appellees.

JAMES RICHARD ARNOLD and CAROL
ARNOLD,

Plaintiffs-Counter-Defendants-
Third-Party Defendants-Appellees,

V

No. 264126
St. Joseph Circuit Court
LC No. 96-001144-CH

DENNIS R. KEMP and MICHAEL D. KEMP,

Defendants-Counter-Plaintiffs-
Appellants,

and

WILLIAM C. DUNN and IOLA C. DUNN,

Third-Party Defendants-Appellees.

JAMES RICHARD ARNOLD and CAROL
ARNOLD,

Plaintiffs-Counter-Defendants-
Third-Party Defendants-Appellants,

V

DENNIS R. KEMP and MICHAEL D. KEMP,

Defendants-Counter-Plaintiffs-
Appellees,

and

DALE ARNOLD,

Third-Party Defendant-Appellant,

and

WILLIAM C. DUNN and IOLA C. DUNN,

Third-Party Defendants.

No. 264578
St. Joseph Circuit Court
LC No. 96-001144-CH

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, defendants Dennis and Michael Kemp (Kemps) appeal as of right the trial court judgment, which followed an extended bench trial,¹ that quieted title in favor of plaintiffs James and Carol Arnold (Arnolds) relative to a one-rod strip of land lying between farm property, owned by the Arnolds, and a mill pond. The mill pond and surrounding property, including a dam, are owned by the Kemps. The trial court concluded that neither the Arnolds nor the Kemps had record title to the disputed strip of land by way of the legal

¹ This case was litigated for nearly nine years, before three different judges, and resulted in numerous orders and judgments, with the last judgment entered being entitled the second amended final judgment.

descriptions contained in the chain of deeds. The court ruled, however, that the Arnolds had established title by adverse possession to the entire one-rod strip of land adjacent to the Arnolds' property and up to the water's edge. The Kemps argue on appeal that the Arnolds failed to establish the elements of adverse possession by clear and cogent evidence, that the Kemps had record title to the property vis-à-vis a default judgment entered in their favor as against third-party defendants William and Iola Dunn and their heirs, and that, alternatively, the Kemps themselves had established title by adverse possession. The Arnolds appeal the trial court's denial of costs, which denial was included in the language of the second amended final judgment, after the court had initially awarded them costs. We affirm, holding that the trial court properly quieted title in favor of the Arnolds to the entire one-rod strip adjacent to the Arnolds' property and up to the water's edge, except we reverse and remand with respect to that part of the judgment that denied the Arnolds' request for costs.

I. Adverse Possession

The Kemps first argue that the Arnolds failed to establish the elements of adverse possession in the bench trial by clear and cogent evidence.

In general, we review a trial court's factual findings in a bench trial for clear error, and its conclusions of law are reviewed de novo. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Actions to quiet title are equitable, and this Court reviews equitable decisions de novo, but the trial court's underlying factual findings are reviewed under the clearly erroneous standard. *Gorte v Dep't of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, supra* at 512. We give due regard to the trial court's superior ability to judge the credibility of witnesses who appeared before it. MCR 2.613(C); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

The underlying statutory basis that gives rise to the doctrine of adverse possession is found in MCL 600.5801, which provides, in pertinent part:

No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.

Ordinarily, an action for recovery or possession of land must be brought within 15 years after it accrues. MCL 600.5801(4); *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993). The *Kipka* panel, examining the principles of adverse possession, ruled:

A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone claiming by adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record

has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. MCL 600.5829. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership. [*Kipka, supra* at 439 (citations omitted).]

In *Wengel v Wengel*, 270 Mich App 86, 92-93; 714 NW2d 371 (2006), this Court further explained the doctrine of adverse possession, stating:

Other cases additionally indicate that the possession must be hostile and under cover of a claim of right. *McQueen v Black*, 168 Mich App 641, 643; 425 NW2d 203 (1988), quoting *Connelly v Buckingham*, 136 Mich App 462, 467-468; 357 NW2d 70 (1984). “The term ‘hostile’ as employed in the law of adverse possession is a term of art and does not imply ill will[;]” rather, hostile use is that which is “inconsistent with the right of the owner, without permission asked or given,” and which use “would entitle the owner to a cause of action against the intruder.” *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976).

Turning to our discussion and analysis, the Arnolds relied on, in general terms, evidence regarding the cultivation of crops on the land, recreational use of the property, the pasturing of livestock, the livestock’s use of the pond as a watering area, the presence of fences on both ends of the property that actually extended into the pond, mowing, and the longtime treatment of the disputed strip of land as property owned by the Arnold family. We conclude that the evidence was sufficient to support the trial court’s ruling.

The trial court found that the 15-year statutory period commenced running sometime prior to 1930, but not as early as 1915, and that by no later than 1945, the Arnolds had established title by adverse possession. This period would encompass the time during which John, James, and Paul Arnold worked the farm. The testimony by James and Paul Arnold, who are brothers and the sons of John Arnold, now deceased, showed that cattle watered in the pond and that the fences were up throughout their youth and into adulthood, especially considering Paul Arnold’s testimony that his family’s use of the land did not change from the time he was a little boy until he last farmed the property in the 1950s. Remnants of the old fences remained on the land.

Actual possession may be established by the use of property for pasturage and by the repair and maintenance of fences. 1 Cameron, *Michigan Real Property Law* (3d ed), Elements of Establishing a Claim [Adverse Possession], § 12.8, p 422, citing *Adair v Bonninghausen*, 305 Mich 137; 9 NW2d 35 (1943). The case law emphasizes that property need not be fenced in to establish adverse possession. *Monroe v Rawlings*, 331 Mich 49, 52; 49 NW2d 55 (1951); Cameron, *supra* at § 12.8, p 422. This, by implication, suggests that the fencing in of property lends strong support for a finding that title was established by adverse possession. See *Doctor v Turner*, 251 Mich 175, 186; 231 NW 115 (1930) (no evidence that premises were fenced, improved, or cultivated); *Davids v Davis*, 179 Mich App 72, 83; 445 NW2d 460 (1989)(finding adverse possession when party erected fences and posted signs). Our Supreme Court has noted though that building fences, in and of itself, does not necessarily establish adverse possession. *Beecher v Ferris*, 117 Mich 108, 110; 75 NW 294 (1898). And mere occupancy of land and claim of title is insufficient to create title by adverse possession. *Doctor, supra* at 186-187.

Occasional or periodic entry upon land is not an act manifesting a purpose to take possession and does not constitute actual possession. *Id.* at 186; Cameron, *supra* at § 12.8, p 422. But the nature of the acts necessary to constitute possession is dependent on the character of the premises. *Adair, supra* at 143; Cameron, *supra* at § 12.8, p 422. When one takes into collective consideration the Arnolds' pasturing of livestock, the livestock's use of the pond, the fencing in of the property, with the fences extending into the water, the long years of recreational use of the area and pond, and, to some degree, the cultivation of crops, there was sufficient evidence to award title in favor of the Arnolds to the entire one-rod strip adjacent to their property and up to the water's edge pursuant to adverse possession, especially given the character of the property. And there was no interruption of the Arnolds' possession during the statutory period, considering that the Ellises, who were the Kemps' predecessors in title, did not acquire their property until 1958, and the Ellises' predecessors did little if anything on the land. See *Taggart v Tiska*, 465 Mich 665, 673-674; 641 NW2d 240 (2002). Contrary to the appellate arguments presented by the Kemps, there was evidence supporting all of the elements of adverse possession. Observation of the fences extending into the water, the livestock's use of the water, and the recreational use of the shoreline and the pond itself should have placed the true owner on notice of a cause of action. In 1996, the Kemps actually constructed a fence that blocked the Arnolds from accessing the shoreline and water, which the Arnold family had done for nearly 100 years. This action by the Kemps instigated this litigation. Of course, the Arnolds' title to the one-rod strip of land remains subject to the Kemps' flowage rights, which ruling has not been appealed.²

We note that the Kemps' claim of adverse possession is apparently pursued on the possibility that we reverse the judgment awarding title to the Arnolds by adverse possession; it is not expressly made in the context of any claim or argument that even if the Arnolds adversely possessed the property by 1945, the Kemps (through the Ellises) adversely possessed it back from the Arnolds subsequent to 1958. Therefore, there is no need to take into consideration the evidence concerning the Kemps' claim of adverse possession. However, assuming that such an argument was presented, or implicitly intended, the Kemps' claim of adverse possession would fail.

The Kemps point to evidence that Bob Ellis, Sr., or individuals working for him, spent time clearing and maintaining the one-rod strip of land around the entire pond, including the area in dispute, removing branches, brush, and vegetation, along with trimming trees, after Ellis began operating the dam, expanding the impoundment, and generating electricity. There was also testimony that Ellis habitually surveyed the property and had placed stakes showing the property lines according to his interpretation of the deeds. Ellis made claims to some individuals that he owned the one-rod strip, and Ellis, for the most part, confined his work within the one-rod strip of land. The aerial photographs do reflect clearing within the one-rod strip surrounding the pond, including the area adjacent to the Arnolds' property, although the photos, of course, do not reveal who did the work. But there was supporting testimony that Ellis was responsible for

² There was no evidence indicating that any flowage rights were being exercised within the one-rod strip adjacent to the Arnolds' property during the time period that the Arnolds' established adverse possession in the 1930s and 1940s.

doing the work, although even the favorable testimony indicated that Ellis's presence and work in the area adjacent to the Arnolds' property was sporadic at best.³ The Kemps argue that, between 1960 and 1981, the Ellises established all of the elements of adverse possession. We, however, are in agreement with the following ruling by the trial court on the issue:

It is the finding of the Court that Mr. Ellis's activity on this rod in question was only for flowage and power purposes. The Kemps proof of title of the rod by adverse possession falls short of the clear and cogent proof needed for the conjunctive elements of adverse possession.

Because the Ellises owned the pond and dam and because it was necessary to clear brush, branches, vegetation, and other debris for purposes of properly maintaining the dam and effectively generating electricity, we cannot conclude that their activity in clearing brush and vegetation around the pond was sufficiently "hostile" such that it placed the Arnolds on notice that the Ellises were claiming the property as their own and that litigation was necessary. Moreover, the work on the one-rod strip adjacent to the Arnolds' property was sporadic, at best, and thus insufficient to support a claim of adverse possession. The Arnolds had not been disseised of the land. *Kipka, supra* at 439.

II. Costs

The Arnolds appeal the trial court's decision not to award them taxable costs. The trial court had initially awarded them costs before reversing its position on the matter. The trial court did not state on the record or in writing why it was rejecting the Arnolds' claim for costs.

"[T]he award of taxable costs to the prevailing party is within the trial court's discretion." *Allard v State Farm Ins Co*, 271 Mich App 394, 403; 722 NW2d 268 (2006). "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1). With respect to identifying the prevailing party in an action involving several issues or counts, MCR 2.625(B)(2) provides:

In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.⁴

³ J.C. Rusk testified that he did some work around the pond for Ellis between 1965 and 1984, when Ellis died, yet only a two-week period sometime in either 1967 or 1968 was devoted by Rusk to working on the Arnolds' side of the pond.

⁴ MCL 600.2421b(3)(a) also defines "prevailing party" as the party who prevails as to each remedy, issue, or count in "an action involving several remedies, or issues or counts which state different causes of actions or defenses[.]"

With regard to the procedural aspects of taxing costs, MCR 2.625(F)(1) provides that costs “may be taxed by the court on signing the judgment, or may be taxed by the clerk.”

Initially, we find that the argument by the Kemps that the Arnolds failed to utilize the proper taxing procedures by not going through the clerk’s office and abiding by the rules relative to that procedure is meritless because MCR 2.625(F)(1) also allows costs to be taxed by the court through a judgment.

There were several issues and counts here that stated different causes of action. In the amended complaint, the Arnolds alleged a claim of record title based on the chain of deeds, a claim of title by adverse possession, and a claim for a prescriptive easement of the one-rod strip. The Kemps’ counterclaim against the Arnolds alleged claims of adverse possession, acquiescence, trespass, and prescriptive easement of the abandoned roadway. Consistent with MCR 2.625(B)(2), each count that alleged different causes of action is considered when determining who is the prevailing party. The Arnolds were the prevailing party on some of the causes of action in this litigation. While MCR 2.625(A)(1) gives the trial court discretion to tax costs, the prevailing party is entitled to costs “unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.” MCR 2.625(A)(1). There is no claim that there exists statutes or court rules that prohibit all of the costs sought by the Arnolds in this litigation that spanned nine years. Therefore, the problem below was the trial court’s complete failure to give any reason in writing for denying costs. Indeed, the court failed to give any reason on the record for denying costs. There was also no determination of the prevailing party on the various counts and causes of action. Therefore, remand is necessary for the trial court to comply with MCR 2.625. If the court again declines to award any costs to the Arnolds, it is directed to give the reasons in writing or cite the statute or court rule that precludes a particular cost request. If the court decides to award costs to the Arnolds, the court is directed to comply fully with the legal authority regarding what costs can be taxed and what supporting documentation is necessary. MCL 600.2401 *et seq.*; MCL 600.2501 *et seq.*; MCR 2.625(G)(2); *LaVene v Winnebago Industries*, 266 Mich App 470, 475; 702 NW2d 652 (2005); *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996). Because the Kemps have not appealed the denial of their request for costs, said issue is not to be addressed on remand.

III. Conclusion

We affirm, holding that the Arnolds acquired title by adverse possession to the entire one-rod strip adjacent to their property and up to the water’s edge, except we reverse and remand with respect to that part of the judgment that denied the Arnolds’ request for costs. The case is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly